

UNITED STATES DISTRICT COURT
DISTRICT OF NEW HAMPSHIRE

Nichole Ingle,

v.

Case No. 10-cv-103-SM

Michael J. Astrue, Commissioner,
Social Security Administration,

REPORT AND RECOMMENDATION

Pursuant to 42 U.S.C. § 405(g), claimant, Nichole Ingle, moves to reverse and remand the Commissioner's decision denying her application for Social Security disability insurance benefits under Title II of the Social Security Act, 42 U.S.C. § 423. The Commissioner, in turn, moves for an order affirming his decision. For the reasons given below, I recommend that the matter be remanded to the Administrative Law Judge ("ALJ") for further proceedings consistent with this opinion.

Standard of Review

The applicable standard of review in this case provides, in pertinent part:

The [district] court shall have power to enter, upon the pleadings and transcript of the record, a judgment affirming, modifying, or reversing the decision of the Commissioner of Social Security, with or without remanding the cause for a rehearing. The findings of the Commissioner of Social Security as to any fact, if supported by substantial evidence, shall be conclusive
. . .

42 U.S.C. § 405(g). However, the court “must uphold a denial of social security disability benefits unless ‘the [Commissioner] has committed a legal or factual error in evaluating a particular claim.’ ” Manso-Pizarro v. Sec’y of HHS, 76 F.3d 15, 16 (1st Cir. 1996) (quoting Sullivan v. Hudson, 490 U.S. 877, 885 (1989)).

As for the statutory requirement that the Commissioner’s findings of fact be supported by substantial evidence, “[t]he substantial evidence test applies not only to findings of basic evidentiary facts, but also to inferences and conclusions drawn from such facts.” Alexandrou v. Sullivan, 764 F. Supp. 916, 917-18 (S.D.N.Y. 1991) (citing Levine v. Gardner, 360 F.2d 727, 730 (2d Cir. 1966)). In turn, “[s]ubstantial evidence is ‘more than [a] mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.’ ” Currier v. Sec’y of HEW, 612 F.2d 594, 597 (1st Cir. 1980) (quoting Richardson v. Perales, 402 U.S. 389, 401 (1971)). Finally, when determining whether a decision of the Commissioner is supported by substantial evidence, the court must “review[] the evidence in the record as a whole.” Irlanda Ortiz v. Sec’y of HHS, 955 F.2d 765, 769 (1st Cir. 1991) (quoting Rodriguez v. Sec’y of HHS, 647 F.2d 218, 222 (1st Cir. 1981)).¹

¹ “It is the responsibility of the [Commissioner] to determine issues of credibility and to draw inferences from the record evidence. Indeed, the resolution of conflicts in the

Background

The parties have submitted a Joint Statement of Material Facts (document no. 13). That statement is part of the court's record and will be summarized here, rather than repeated in full.

Ingle is five feet six inches tall and weighs approximately 310 pounds. Her most recent employment was as a cashier at Walmart, a position she left on March 15, 2006. At the hearing before the ALJ, Ingle said she quit her Walmart job mainly because of "really, really bad flank pain on the left side." (Administrative Transcript (hereinafter "Tr.") at 8.) She also mentioned knee problems, carpal tunnel syndrome, arthritis, and back pain. (Tr. at 8-9.)

Ingle has an extensive medical history including treatment for a left kidney impairment (which dates from early childhood), degenerative joint disease in both knees, carpal tunnel syndrome, shoulder pain, back pain (initially resulting from a motor vehicle accident in 2000), and breast cancer. The record includes the following relevant opinion evidence: (1) a New Hampshire Department of Health & Human Services ("HHS") physical capacity evaluation, completed by internist James Stauber on

evidence is for the [Commissioner], not the courts." Irlanda Ortiz, 955 F.2d at 769 (citations omitted). Moreover, the court "must uphold the [Commissioner's] conclusion, even if the record arguably could justify a different conclusion, so long as it is supported by substantial evidence." Tsarelka v. Sec'y of HHS, 842 F.2d 529, 535 (1st Cir. 1988).

March 23, 2007;² (2) an HHS physical capacity evaluation, completed by family-practice physician Chong So on August 30, 2007; (3) a residual functional capacity assessment, completed by state-agency medical consultant Burton Nault on April 29, 2008;³ (4) a medical source statement of ability to do work-related activities (physical), completed by Dr. So on June 17, 2008;⁴ and (5) a medical source statement of ability to do work-related activities (physical), completed by Dr. So on August 4, 2009.⁵

² The Joint Statement of Material Facts gives the date of Dr. Stauber's evaluation as March 23, 2009, but that appears to be incorrect. (See Tr. at 563-66.)

³ Dr. Nault determined that Ingle could frequently lift and carry ten pounds, stand and/or walk (with normal breaks) for at least two hours in an eight-hour workday, sit (with normal breaks) for about six hours in an eight-hour workday, and push and pull without limitation. (Tr. at 391.) Dr. Nault's findings are consistent with the ability to perform the full range of sedentary work. See 20 C.F.R. § 416.967(a) (setting out the physical-exertion requirements for sedentary work).

⁴ Dr. So determined that Ingle could occasionally lift and carry up to ten pounds (Tr. at 399), and could sit one hour at a time for a total of six hours in an eight-hour workday, stand five minutes at a time for a total thirty minutes in an eight-hour workday, and walk ten minutes at a time for a total of sixty minutes in an eight-hour workday (Tr. at 400).

⁵ Dr. So opined that Ingle could occasionally lift and carry up to ten pounds (Tr. at 591), and could sit one hour at a time for a total of six hours in an eight-hour workday, stand ten minutes at a time for a total of one hour in an eight-hour workday, and walk fifteen minutes at a time for a total of two hours in an eight-hour workday (Tr. at 592).

Ingle applied for Social Security disability insurance benefits on March 13, 2008. She claimed to have been unable to work since she left her job at Walmart due to kidney problems, arthritis in her feet, and problems with her knees and neck. (Tr. at 109.) At her hearing before the ALJ, Ingle described her daily activities, which included getting her four-year-old-twin sons dressed in the morning, feeding them breakfast and lunch, performing housework such as doing laundry, preparing relatively simple dinners for her family, and putting her sons to bed. (Tr. at 9-12.) She also testified that she needed to take breaks while engaging in those activities due to her pain. (Tr. at 30.) In addition, Ingle testified that her carpal tunnel syndrome along with her bad back and knees preclude her from doing dishes by hand (Tr. at 9-10), and that knee pain makes it difficult for her to make beds and retrieve things from low cupboards (Tr. at 13).

After the hearing, the ALJ issued a decision which included the following findings:

3. The claimant has the following severe impairments:
(1) mildly atrophic left kidney, (2) obesity, (3) mild degenerative joint disease (20 CFR 404.1520(c)).⁶

. . . .

⁶ The ALJ also noted the following non-severe impairments: dermatitis of the foot, carpal tunnel syndrome, bilateral shoulder pain, and back pain. (Tr. at 28.)

4. The claimant does not have an impairment or combination of impairments that meets or medically equals one of the listed impairments in 20 CFR Part 404, Subpart P, Appendix 1 (20 CFR 404.1520(d), 404.1525, 404.1526).

. . . .

5. After careful consideration of the entire record, the undersigned finds that the claimant has the residual functional capacity to perform the full range of sedentary work as defined in 20 CFR 404.1567(a). Specifically, the claimant can frequently lift and carry 10 pounds, stand and/or walk for at least 2 hours in an 8-hour workday, sit for a total of 6 hours in an 8-hour workday, and can perform unlimited pushing and pulling. Further, the claimant can occasionally climb stairs and ladders, balance, stoop, kneel, crouch, and crawl.

. . . .

6. The claimant is capable of performing past relevant work as a data entry worker. This work does not require the performance of work-related activities precluded by the claimant's residual functional capacity (20 CFR 404.1565).⁷

(Tr. at 27, 29, 31.)

In determining that Ingle retained the residual functional capacity to perform the full range of sedentary work, the ALJ found that Ingle's "medically determinable impairments could reasonably be expected to cause the alleged symptoms" (Tr. at 30), but further found that her "statements concerning the

⁷ In addition to finding that Ingle had the residual functional capacity to perform her past relevant work, the ALJ went on to find, in the alternative, that in light of Ingle's capacity to perform the full range of sedentary work, there were jobs that exist in significant numbers in the national economy, in addition to her past relevant work, that she could also perform. (Tr. at 31-32.)

intensity, persistence and limiting effects of these symptoms [were] not credible to the extent they are inconsistent with the above residual functional capacity assessment" (Tr. at 30). The ALJ also stated that "[i]n terms of the claimant's alleged inability to engage in sustain[ed] work activities even at a sedentary level . . . the claimant allegations are inconsistent with the medical evidence of record." (Tr. at 30.) After rejecting Ingle's allegations of disabling pain, the ALJ adopted the findings of Dr. Nault and stated his reliance on "claimant's testimony regarding her ability to perform daily activities" (Tr. at 31). Finally, the ALJ accepted Dr. So's findings in part, but also rejected them in part because they appeared to be both internally inconsistent and inconsistent with the medical evidence of record, and because they included "multiple changes which appear to have been incorporated after discussion with the claimant." (Tr. at 30.)

Discussion

According to Ingle, the ALJ's decision should be reversed, and the case remanded, because the ALJ: (1) erred in assessing her credibility and residual functional capacity; (2) failed to properly consider her obesity when determining her residual functional capacity; and (3) failed to consider the impact of her non-severe impairments when determining her residual functional

capacity. The Commissioner disagrees, categorically. Because Ingle's first argument is meritorious, and entitles her to a remand, there is no need to consider her second and third arguments.

To be eligible for disability insurance benefits, a person must: (1) be insured for such benefits; (2) not have reached retirement age; (3) have filed an application; and (4) be under a disability. 42 U.S.C. §§ 423(a)(1)(A)-(D). The only question in this case is whether the ALJ correctly determined that Ingle was not under a disability.

For the purpose of determining eligibility for disability insurance benefits,

[t]he term "disability" means . . . inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than 12 months.

42 U.S.C. § 423(d)(1)(A). Moreover,

[a]n individual shall be determined to be under a disability only if [her] physical or mental impairment or impairments are of such severity that [she] is not only unable to do [her] previous work but cannot, considering [her] age, education, and work experience, engage in any other kind of substantial gainful work which exists in the national economy, regardless of whether such work exists in the immediate area in which [she] lives, or whether a specific job vacancy exists for [her], or whether [she] would be hired if [she] applied for work. For purposes of the preceding sentence (with respect to any individual), "work which exists in the national economy" means work which exists

in significant numbers either in the region where such individual lives or in several regions of the country.

42 U.S.C. § 423(d)(2)(A).

In order to determine whether a claimant is disabled for the purpose of determining eligibility for disability insurance benefits, an ALJ is required to employ a five-step process. See 20 U.S.C. §§ 404.1520.

The steps are: 1) if the [claimant] is engaged in substantial gainful work activity, the application is denied; 2) if the [claimant] does not have, or has not had within the relevant time period, a severe impairment or combination of impairments, the application is denied; 3) if the impairment meets the conditions for one of the "listed" impairments in the Social Security regulations, then the application is granted; 4) if the [claimant's] "residual functional capacity" is such that he or she can still perform past relevant work, then the application is denied; 5) if the [claimant], given his or her residual functional capacity, education, work experience, and age, is unable to do any other work, the application is granted.

Seavey v. Barnhart, 276 F.3d 1, 5 (1st Cir. 2001) (citing 20 C.F.R. § 416.920, which outlines the same five-step process as the one prescribed in 20 C.F.R. § 1520).

The claimant bears the burden of proving that she is disabled. See Bowen v. Yuckert, 482 U.S. 137, 146 (1987). She must do so by a preponderance of the evidence. See Mandziej v. Chater, 944 F. Supp. 121, 129 (D.N.H. 1996) (citing Paone v. Schweiker, 530 F. Supp. 808, 810-11) (D. Mass. 1982)). Finally,

[i]n assessing a disability claim, the [Commissioner] considers objective and subjective factors, including: (1) objective medical facts; (2) plaintiff's subjective

claims of pain and disability as supported by the testimony of the plaintiff or other witness; and (3) the plaintiff's educational background, age, and work experience.

Mandziej, 944 F. Supp. at 129 (citing Avery v. Sec'y of HHS, 797 F.2d 19, 23 (1st Cir. 1986); Goodermote v. Sec'y of HHS, 690 F.2d 5, 6 (1st Cir. 1982)).

Ingle's first argument is that the ALJ erroneously found her claims of disabling pain not to be credible, and erroneously found that she had the residual functional capacity to perform sedentary work. Ingle claims the finding erroneous because in making both of those determinations, the ALJ failed to properly credit her testimony that when she carried out her daily activities, she had to take frequent breaks due to the pain she was experiencing. Ingle's point is well taken, and dispositive.

According to Social Security Ruling ("SSR") 96-7p, "an individual's statement(s) about his or her symptoms⁸ is not in itself enough to establish the existence of a physical or mental impairment or that the individual is disabled," 1996 WL 374186, at *2. When "symptoms, such as pain, fatigue, shortness of breath, weakness, or nervousness," id., are alleged, SSR 96-7p prescribes a two-step evaluation process:

⁸ "A symptom is an individual's own description of his or her physical or mental impairment(s)." SSR 96-7p, 1996 WL 374186, at *2.

* First, the adjudicator must consider whether there is an underlying medically determinable physical or mental impairment(s) - i.e., an impairment(s) that can be shown by medically acceptable clinical and laboratory diagnostic techniques - that could reasonably be expected to produce the individual's pain or other symptoms. . . . If there is no medically determinable physical or mental impairment(s), or if there is a medically determinable physical or mental impairment(s) but the impairment(s) could not reasonably be expected to produce the individual's pain or other symptoms, the symptoms cannot be found to affect the individual's ability to do basic work activities.

* Second, once an underlying physical or mental impairment(s) that could reasonably be expected to produce the individual's pain or other symptoms has been shown, the adjudicator must evaluate the intensity, persistence, and limiting effects of the individual's symptoms to determine the extent to which the symptoms limit the individual's ability to do basic work activities. For this purpose, whenever the individual's statements about the intensity, persistence, or functionally limiting effects of pain or other symptoms are not substantiated by objective medical evidence, the adjudicator must make a finding on the credibility of the individual's statements based on a consideration of the entire case record.

Id. In addition:

When additional information is needed to assess the credibility of the individual's statements about symptoms and their effects, the adjudicator must make every reasonable effort to obtain available information that could shed light on the credibility of the individual's statements. In recognition of the fact that an individual's symptoms can sometimes suggest a greater level of severity of impairment than can be shown by the objective medical evidence alone, 20 CFR 404.1529(c) and 416.929(c) describe the kinds of evidence, including the factors below, that the adjudicator must consider in addition to the objective medical evidence when assessing the credibility of an individual's statements:

1. The individual's daily activities;
2. The location, duration, frequency, and intensity of the individual's pain or other symptoms;
3. Factors that precipitate and aggravate the symptoms;
4. The type, dosage, effectiveness, and side effects of any medication the individual takes or has taken to alleviate pain or other symptoms;
5. Treatment, other than medication, the individual receives or has received for relief of pain or other symptoms;
6. Any measures other than treatment the individual uses or has used to relieve pain or other symptoms (e.g., lying flat on his or her back, standing for 15 to 20 minutes every hour, or sleeping on a board); and
7. Any other factors concerning the individual's functional limitations and restrictions due to pain or other symptoms.

Id. at *3.

Here, the ALJ did determine that there was an underlying medically determinable physical impairment that could reasonably be expected to produce Ingle's pain (Tr. at 30), thus completing the first step of the SSR 96-7p evaluation process. The problem arises at the second step.

In his decision, the ALJ stated: "In terms of the claimant's alleged inability to engage in sustain[ed] work activities even at a sedentary level, the undersigned finds that the allegations are inconsistent with the medical evidence of record." (Tr. at 30.) That statement appears to be directed toward the ALJ's

obligation to make a credibility assessment when "the individual's statements about the intensity, persistence, or functionally limiting effects of pain or other symptoms are not substantiated by objective medical evidence." SSR 96-7p, 1996 WL 374186, at *2.

If the ALJ was trying to establish that Ingle's allegations about disabling pain were not substantiated by objective medical evidence, the cursory statement quoted above is insufficient. As Baker v. Astrue explains: "If after evaluating the objective findings, the ALJ determines that the claimant's reports of symptoms are significantly greater than what could be reasonably anticipated from the objective evidence, the ALJ must then consider other relevant information." Civil Action No. 08-11812-RGS, 2010 WL 3191452, at *8 (D. Mass. Aug. 11, 2010) (emphasis added). In other words, before "weigh[ing] the credibility of a claimant's statements about pain . . . [t]he ALJ must first find a lack of support in objective medical evidence for the allegations of pain." Caille v. Comm'r of Soc. Sec., Civil No. 09-1305, 2010 WL 1424725, at *3 (D.P.R. Apr. 6, 2010) (emphasis added).

In this case, the ALJ did say that Ingle's allegations concerning pain were "inconsistent with the medical evidence of record" (Tr. at 30), but he provided no analysis supporting that conclusion and failed to identify the medical evidence that was

supposedly inconsistent with Ingle's allegations. Thus, the decision does not demonstrate any evaluation of the objective medical evidence or describe a proper finding concerning the asserted lack of support for Ingle's allegations. As in Santiago v. Astrue, Civil Action No. 09-30006-KPN, 2009 WL 3517611 (D. Mass. Oct. 14, 2009), which resulted in a remand, the ALJ in this case "did not discuss . . . how Plaintiff's statements were inconsistent with the objective medical evidence," id. at *8 (emphasis added).⁹ In short, the ALJ's decision does not contain an adequate determination that Ingle's symptoms were not substantiated by objective medical evidence.

Even if the ALJ's decision did adequately establish that Ingle's symptoms were not substantiated by the medical evidence of record, the ALJ's credibility determination falls short in its consideration of the seven factors listed in 20 C.F.R. § 404.1529(c)(3) and SSR 96-7p. While SSR 96-7p says that the adjudicator must consider the seven factors listed therein, the ALJ's discussion of Ingle's credibility says nothing about: the location, duration, frequency, or intensity of her pain (factor two); the factors that precipitate and aggravate her pain (factor

⁹ The Commissioner points out that the ALJ did discuss the medical evidence of record in his decision. But he did so in the portion of the decision devoted to determining whether Ingle had a severe impairment, not the portion devoted to assessing the impact of her symptoms on her residual functional capacity. Thus, the ALJ made no meaningful connection between the medical evidence and Ingle's symptoms.

three); her use of pain medication (factor four); treatment other than medication she has tried (factor five); or measures other than treatment that she has used to alleviate her pain (factor six). While an ALJ may not be obligated to slavishly discuss each of the factors listed in SSR 96-7p, see Crocker v. Astrue, No. 07-220-P-S, 2008 WL 2775980, at *4 (D. Me. June 30, 2008), more analysis is required than is provided in this case.

Moreover, the single factor that is addressed in the ALJ's decision, Ingle's daily activities, is not handled adequately. First, when the ALJ determined Ingle's allegation of disabling pain not to be credible, he focused on her ability to perform household chores and take care of her family. But, despite having reported her testimony that she is able to perform those activities only by taking frequent breaks, the ALJ did not take that testimony into account in his credibility assessment, either in the context of factor one (daily activities) or factor six (measures other than treatment that alleviate pain).¹⁰ Moreover, the ALJ's credibility assessment devolves into near circularity when it says, in essence, that Ingle's ability to work around the

¹⁰ The Commissioner argues that the ALJ "did not find Plaintiff's reports of taking frequent breaks to be credible," (Resp't's Mem. (document no. 12-1), at 11), but that is both a misreading of the decision and entirely unsupported by substantial evidence, such as testimony that Ingle did not take frequent breaks, or that she undertook other activities without needing breaks. Rather than finding Ingle's testimony about frequent breaks not to be credible, the ALJ actually determined that her claims of disabling pain were not credible.

house and care for her family diminishes the credibility of her allegation that she is able to do those things only by taking frequent breaks. That Ingle is able to perform certain activities is not evidence that she is able to perform them without taking frequent breaks to recover from the pain they engender.

In sum, the ALJ's assessment of Ingle's credibility, and his determination of her residual functional (which rests on the credibility assessment), are flawed by the ALJ's failure to properly address Ingle's allegations of disabling pain within the framework established in SSR 96-7p. On that basis, his decision is not supported by substantial evidence, and must be remanded.

Conclusion

For the reasons given above, I recommend that: (1) the Commissioner's motion for an order affirming his decision (document no. 12) be denied; (2) claimant's motion for an order reversing and remanding the Commissioner's decision (document no. 10) be granted; and (3) pursuant to sentence four of 42 U.S.C. § 405(g), this matter be remanded to the ALJ for further proceedings.

Any objections to this report and recommendation must be filed within fourteen (14) days of receipt of this notice. Failure to file objections within the specified time waives the

right to appeal the district court's order. See Unauth. Practice of Law Comm. v. Gordon, 979 F.2d 11, 13-14 (1st Cir. 1992); United States v. Valencia-Copete, 792 F.2d 4, 6 (1st Cir. 1986).



Landya B. McCafferty
Magistrate Judge

November 8, 2010

cc: Raymond J. Kelly, Esq.
T. David Plourde, Esq.